IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1941.

No. 706

CITY OF CHICAGO, a Municipal Corporation, BOARD OF HEALTH OF THE CITY OF CHICAGO, DR. ROBERT A. BLACK, Health Commissioner and Acting President of Board of Health of the City of Chicago,
Petitioners,

vs.

FIELDCREST DAIRIES, INC.,
Respondent.

REPLY TO ADDITIONAL SUGGESTIONS FILED BY AMICUS CURIAE.

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CHAMPLIN-SHEALY COMPANY, CHICAGO 365

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"Regulate" and "Prohibit".

Much of what the attorney general's brief says is answered in the briefs already filed by the petitioners. But it is important to point out the infirmity in his contention that the city's power to regulate the sale of milk does not authorize the prohibition of paper milk containers.

In discussing the relative terms "regulate" and "prohibit" the attorney general's brief overlooks the necessity of considering the subject-matter of a power to regulate. Every power to regulate necessarily includes the power to prohibit what does not meet a regulation imposed. In the

case at bar the subject-matter of the city's power to regulate is the sale of milk. The power is derived from the 1872 Cities and Villages Act giving the city power "to regulate the sale of . . . provisions" and the 1941 statute authorizing the city "to regulate the sale of all beverages" and "to . . . regulate . . . the manner in which any beverage . . . for human consumption is sold" (see brief of petitioners, pp. 13-14). The Illinois Supreme Court said in *Koy* v. *City of Chicago*, 263 Ill. 122, 131 (1914), that in the exercise of these powers a city may require "the receptacles in which milk is contained to be of prescribed character." And the saving clause in the 1939 Milk Pasteurization Plant Act provided that nothing therein impaired the power of the city "to regulate the . . . sale or distribution of pasteurized milk."

The brief of the attorney general argues as if the subject-matter of the city's power to regulate were merely paper milk containers. It may be that a grant of power merely to regulate paper milk containers would not include the power to prohibit them absolutely. But while the power to regulate the sale of milk or the manner of selling milk might not authorize the city to forbid absolutely the sale of milk, it necessarily includes power to prohibit a milk container that does not comply with the regulations prescribed under the power to regulate the sale of milk.

This obvious conclusion is not contradicted by the authorities referred to by the attorney general. There is no peculiar "federal rule" about powers to regulate, as the attorney general intimates (p. 1). His brief refers to judicial constructions of the word "regulate" noted in 36 *Words and Phrases*, 696-702. Many of the cases there cited held that statutes granting cities the power to regulate intoxicating liquor did not authorize them to pass or-

dinances absolutely prohibiting its sale. So in *People* v. *Busse,* 240 Ill. 338 (1909), where the statute granted the city power to regulate "second-hand junk stores," an ordinance imposing an absolute prohibition on second-hand junk stores in certain areas was held unauthorized. In all of these cases the entire subject-matter of the power to regulate was absolutely prohibited. In the case at bar the subject-matter of the power—the sale of milk—is not completely prohibited by the ordinance but is merely regulated.

Other Illinois cases cited by the attorney general do not support his contention. In *Haggenjos* v. *City of Chicago,* 336 Ill. 573, 576, 577 (1929), it was said, "the power to regulate implies the power to prohibit except upon the observation of authorized regulation." Applying this language here, the power to regulate the sale of milk implies the power to prohibit its sale except upon the observation of the regulation that the sale must be made in standard milk bottles. In quoting from *Chicago Motor Coach Co.* v. *City of Chicago,* 337 Ill. 200, 206 (1929) and in discussing *City of Geneseo* v. *Illinois Northern Utilities Company,* 378 Ill. 506 (1941), the attorney general overlooks the fact that in the later case the Illinois Supreme Court discounted the importance of the distinction drawn in the earlier case between powers to regulate and powers to prohibit. The Supreme Court said (p. 519) that the *Chicago Motor Coach Co.* and another case were

> ". . . the only direct authority for the contention that the Public Utilities act has taken from cities all power to permit or *prohibit* the use of a street by a public utility, as distinguished from the right to *regulate* a public utility operating in the street under a license or franchise granted by the city." (Italics added.)

And the court said (p. 530) that anything said in these two earlier cases indicating that a city's power to refuse a

license to a public utility had been repealed by the Public Utilities Act "is not adhered to."

The inconsistency of the attorney general's position is apparent from his concession (p. 5) that city regulation may be "more stringent and more detailed than those adopted by the state legislature." This concession points directly to the conclusion that the city may forbid the use of paper milk containers. The statute says only that paper containers "shall be manufactured and transported in a sanitary manner" (section 15, item 10). It does not require their use. And the certificate of approval issued by the state to the owner of a plant means only "compliance with the provisions of" the act (section 1(e), brief of petitioners, p. 80). Nowhere does the act say expressly or by implication that specific articles are "approved" in the sense of being put beyond the reach of further municipal regulation. On the contrary, the saving clause in section 19 says just the reverse.

The Attorney General's Suggestion about Disposition of the Case.

The attorney general's memorandum suggests (p. 6) that the case be decided by affirming the judgment below or by remanding the case to the district court to await the decision of a criminal prosecution to be brought in the state courts by the city against some other company using paper cartons, the injunction in the meantime to remain in effect. The unseemly partisanship of this suggestion is apparent. But there are also inherent obstacles to any disposition of the case other than full disposition on the merits:

1. The district court's holding and the Circuit Court of Appeals' statement that the ordinance is an unreasonable

regulation under the due process clause of the fourteenth amendment constitute an obstacle which, realistically considered, is almost insurmountable. The state courts will feel bound by these rulings as this court feels bound by state court rulings on local questions.

2. A police court is not an appropriate forum for the determination of a constitutional question that requires the testimony of experts.

3. If a state court action for an injunction is brought by a milk distributor, either upon a dismissal of the case at bar for want of equity jurisdiction or a remandment to the district court to await a decision of the state question in the state courts, the plaintiff will be compelled to urge that the ordinance is invalid under the fourteenth amendment. If he relies simply upon the alleged impairment of the city's power, he forfeits the opportunity to raise the constitutional question, for a rule of ancient vintage, originating in a desire to expedite the disposition of litigation, prevents him from "splitting" his cause of action.

4. The federal courts' ruling on the constitutional question will be ground for a temporary injunction in the state courts and will ensure the success of any injunction suit in the state courts, even though the state courts hold with the city on the question of the city's power.

5. The plaintiff in the state court action will be compelled (and so also will the city) to present evidence on the constitutional question. The long process of the taking of expert testimony will be repeated. The city will be compelled to defend another lengthy trial, after it has defended the trial in the case at bar on the same question with the resulting accumulation of three fat volumes of evidence.

6. The litigation over the constitutional question will continue for years to come, until finally passed upon by this court. The constitutional validity of the ordinance will remain in doubt, its enforcement prohibited by injunction. And during this period there will remain in effect the destructive holding of the district court and the similar dictum of the Circuit Court of Appeals that public health regulations are invalid when they prohibit what is permitted elsewhere.

The impractical consequences of the failure of this court to decide all issues raised would be particularly unfortunate in view of the simplicity of the local question of the city's power. The state law—the 1939 Milk Pasteurization Plant Act—clearly leaves unimpaired the power of the city to regulate the sale of milk and prescribe the type of milk containers to be used. This is apparent when the problem presented is correctly analyzed—the city's power is determined by looking to the legislative grant. The law as stated by the legislature should not be considered as the pronouncement of an inferior body. Surely this court can determine what the state law is from the clear language of the statute even in the absence of a declaration by a state court: "the law as stated by the legislature means what it says." Legislation does not require judicial endorsement to be effective.

Similarly the record in this case makes the constitutional question an easy one to decide.

We continue to urge the court to decide the case on the merits, as we have done in all the briefs filed in this court

(brief in support of petition for certiorari, pp. 36-37; brief of petitioners, pp. 31-34; reply brief of petitioners, pp. 4-6).

Respectfully submitted,

CITY OF CHICAGO, a Municipal Corporation,

BOARD OF HEALTH OF THE CITY OF CHICAGO,

DR. ROBERT A. BLACK, Health Commissioner and Acting President of Board of Health of the City of Chicago,

Petitioners,

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